No. 84-2023

Office - Supreme Court, U.S.
FILED
JUN 27 1985
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IN THE

Supreme Court of the United States

October Term, 1984

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., THE CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
Petitioners,

vs.

MARINE MIDLAND BANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Does a national bank "establish and operate" a "branch" under the National Bank Act when it enables its customers to make deposits, receive withdrawals and obtain credit card advances from an automated teller machine ("ATM") which is owned by a third party?

2. Does a regulation of the Comptroller of the Currency, which classifies ATMs as "branches" only when they are "owned or rented" by a national bank, improperly narrow the application of the National Bank Act?

3. Does a national bank "rent" and hence "establish" an ATM as a "branch" under the National Bank Act when it pays a fee to the ATM owner for each customer transaction at the ATM?

Parties to the Action

In addition to petitioners* and respondent named in the caption, Wegman's Food Markets, Inc. ("Wegman's"), the owner of the ATM at issue in this case, was a party in the District Court and on appeal to the Second Circuit. However, petitioners do not pursue further their claim against Wegman's before this Court. Petitioners therefore have notified the Clerk that Wegman's no longer has any interest in the outcome of this petition, pursuant to Rule 19.6.

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* Pursuant to Rule 28.1 of this Court, petitioners state that the Independent Bankers Association of New York State, Inc. ("IBANYS") is a statewide trade association of 90 community-based independent banks. A current listing of the membership is set forth in Appendix E. (52a-55a.) IBANYS is affiliated with the Independent Bankers Association of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, IBANYS and The Canandaigua National Bank and Trust Company ("CNB"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit (Feinberg, C.J., Newman and Pratt, J.), entered in this action on February 27, 1985.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit ("Second Circuit") reversing the District Court is reported at 757 F.2d 453. (4a.)[1]

The memorandum decision and order of the District Court for the Western District of New York, granting summary judgment and a permanent injunction in favor of petitioners against respondent Marine Midland Bank, N.A. ("Marine"), is reported at 583 F.Supp. 1042. (31a.)

Jurisdiction

The judgment of the Second Circuit was entered on February 27, 1985. By order of Mr. Justice Thurgood Marshall dated April 18, 1985, the time for filing a petition for a writ of certiorari was extended to and including June 29, 1985. (51a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

This appeal involves two portions of §36 of the National Bank Act (the "Act"),[2] two New York state branch banking statutes incorporated by reference into §36 of the Act, and a 1982 regulation of the Comptroller of the Currency (the "Comptroller"), all of which are set forth in Appendix A. (1a.)

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[1] Citations herein to material printed in the Appendix appear as "_____a."

[2] The portions of the Act which are at issue were added or amended principally by the McFadden Act of 1927, ch. 191, §7, 44 Stat. 1228, and the Banking Act of 1933, ch. 89, §23, 48 Stat. 189, 190, and are codified at 12 U.S.C. §36.

All parties interested in this appeal agree that its outcome, and the preservation or destruction of the States' role in the regulation of branch banking at ATMs across the United States, hinge on the proper interpretation of three words in §36 of the Act, which are highlighted in the following excerpt:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, *establish* and *operate* new *branches*: ... .

(emphasis added).

Statement of the Case

I. Summary Statement

The ATM at issue in this case is owned by a business corporation which operates a chain of grocery stores. Pursuant to a contract between a national bank and the ATM owner, customers of the national bank use the ATM to make deposits, receive withdrawals and obtain credit card advances from their bank accounts. The national bank pays a fee to the ATM owner for each transaction at the ATM. Petitioners contend that the national bank has therefore "established and operated" a "branch" bank at the ATM, in violation of §36 of the Act and the state branch banking laws which are incorporated into the Act. The national bank contends that it does not "own" or "rent" the ATM, and hence has not "established and operated" a "branch."

If petitioners' interpretation of the Act, which preserves state law regulation of ATM use in branch banking, is correct, then the District Court's injunction of the national bank's use of the ATM must be reinstated. If, on the other hand, the national bank's

suggested loophole in the Act is accepted by this Court, then the Second Circuit's decision must be affirmed, and all national banks may use third party-owned ATMs for interstate deposit taking and other banking functions anywhere in the United States, in disregard of all state branch banking laws, and without the need to obtain approval from the Comptroller.

II. Jurisdiction and Proceedings in District Court

IBANYS and CNB commenced this action in the District Court for declaratory and injunctive relief against Marine, a national banking association, and Wegman's, a regional supermarket chain. In their First Claim, IBANYS and CNB alleged that Marine, by enabling its customers to make deposits and receive withdrawals at an ATM in the Wegman's grocery store in Canandaigua, New York, had "established and operated" a "branch" bank in violation of §36 of the Act, as it incorporates the limitations on branch banking in Canandaigua created by New York Banking Law §§105 and 105-a. (1a-2a.)

In their Second Claim, IBANYS and CNB alleged that Wegman's provision and maintenance of its ATM constituted an unlawful encroachment upon the powers of banks and trust companies in violation of New York Banking Law §131.1.

Federal jurisdiction in the District Court on the First Claim was based upon 28 U.S.C. §§1337 and 1331. The

Second Claim was based upon the District Court's pendent jurisdiction over state claims.[3]

III. Facts

In 1887 CNB established its home office on Main Street in Canandaigua, New York, a small upstate city with a current population of less than 11,000. CNB benefits from New York's long-established policy of "home office protection" which generally prohibits branch banking by state banks in Canandaigua. CNB is a member of IBANYS, which has 90 member banks. Of these 90 members, 76 benefit from "home office protection" in their respective communities. (52a-55a.)

In 1983 Wegman's purchased and installed an ATM in its Canandaigua store, at a location several feet away from CNB's previously established in-store branch bank and full-service ATM. Marine was the first of several banks and other financial institutions to contract with Wegman's for the use of Wegman's ATM, which enabled Marine customers to make deposits to or withdrawals from their

[3] Wegman's moved to dismiss the Second Claim for lack of pendent party jurisdiction. The District Court held that it had, and in its discretion would exercise, such jurisdiction over Wegman's. *Independent Bankers Ass'n of New York State, Inc. v. Marine Midland Bank, N.A.*, 575 F. Supp. 1425 (W.D.N.Y. 1983). The District Court later granted summary judgment dismissing the Second Claim against Wegman's. *Independent Bankers Ass'n of New York State, Inc. v. Marine Midland Bank, N.A.*, 583 F.Supp. 1042, 1049 (W.D.N.Y. 1984). (49a.)

On appeal, the Second Circuit vacated the District Court's summary judgment in Wegman's favor and dismissed the Second Claim, holding that "the application of New York Banking Law to Wegmans' provision and maintenance of an ATM should be left to the courts of the state." *Independent Bankers Ass'n of New York State, Inc. v. Marine Midland Bank, N.A.*, 757 F.2d 453, 465 (2d Cir. 1985). (30a.) Petitioners are not pursuing the state law claim and pendent party issues before this Court.

Marine bank accounts, transfer funds between accounts, pay loan obligations to Marine and service bills to public utilities, and receive advances on Marine credit cards.

Marine does not have its own ATM or any other banking facility in Canandaigua. Marine never applied for approval from the Comptroller to establish this bank account access for its customers at Wegman's ATM in Canandaigua.

Marine customers made account deposits or withdrawals at the Wegman's ATM by utilizing a plastic "CashCard" and personal identification number issued by Marine. Upon proper authorization from Marine's in-house computer, the ATM issued receipts for all customer transactions. These transactions were later reflected in the customer's monthly account statements. Marine paid Wegman's a fee for each transaction between Marine and its customers at the ATM.

In the summer of 1983, Marine customers began using Wegman's ATM. Shortly thereafter, IBANYS and CNB commenced this action to enjoin its use.

IV. The District Court Decision

By memorandum decision and order dated April 6, 1984, the District Court held that:

> Marine's present utilization of the ATM machine in Wegman's Canandaigua store constitutes the operation of a "branch" within the meaning of 12 U.S.C. Section 36(f) and such activities are, therefore, unlawful pursuant to 12 U.S.C. §36(c) in conjunction with New York Banking Law §105.

(50a.) Accordingly, the court permanently enjoined Marine "from utilizing the Canandaigua Wegman's ATM to allow its customers to make deposits or withdrawals

from Marine Midland accounts or to receive cash advances from Marine Midland Credit Card accounts." (50a.)

Marine acknowledged that under the Act and state law, it could not establish and operate a "brick and mortar" branch or employ its own proprietary ATM in Canandaigua. The District Court reasoned that Marine's use of Wegman's ATM, rather than its own, for the same banking transactions could not provide the basis for a different result. The District Court concluded that this case was indistinguishable from *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), *cert. denied sub nom. Bloom v. Independent Bankers Ass'n of America*, 429 U.S. 862 (1976) ("*IBAA v. Smith*"), in which the D.C. Circuit Court of Appeals held that ATMs were "branches" under the Act, and rejected the Comptroller's attempt to classify all electronic banking terminals as non-branches. Marine's argument that Wegman's ownership of the ATM furnished an escape from the interdiction of the Act was labeled as "the proverbial distinction without a difference," because it exalted the "form" of ATM ownership over the "substance" of the banking transactions which were occuring at and through the ATM. (43a.)

Relying on this Court's decision in *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122 (1969) ("*Plant City*"), the District Court noted that Congress had given the definitional terms found in §36 of the Act a "calculated indefiniteness", and thus the Act had to "be read broadly to promote the overall policy behind the Act"—namely, competitive equality between state and national banks in the same geographic location. (43a.) *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). ("*Walker Bank*".) Because

Marine's contract with Wegman's for access to the ATM allowed Marine to provide services not available to customers of state banks at the same location, and hence gave Marine a competitive advantage, the District Court held Marine's use of Wegman's ATM to be prohibited under §36(c) and New York state law.

The District Court also considered, but refused to defer to and apply a Comptroller's regulation, which provides that only those ATMs which are "owned or rented" by national banks, are deemed to be "established and operated" by them, and subject to state branch banking laws. 12 C.F.R. §5.31(b) (1982). (3a.) The District Court found no support for this narrowing of the Act's coverage by the Comptroller in either the language of the Act or the *Plant City* decision. Moreover, deference to the Comptroller's "owned or rented" test was not appropriate, because the Comptroller had a demonstrated history of misinterpreting §36 of the Act, and applying it in a way which was contrary to Congressional intent. (42a.)

The District Court further held that Marine's use of Wegman's ATM would be enjoined as an impermissible branch "even under the Comptroller's strained interpretation of the statute," because Marine paid Wegman's "rent" in the form of a transaction fee each time the ATM was used. (44a, n.2.)

V. The Second Circuit Decision

The Second Circuit reversed the District Court, stating:

> [W]e hold that a national bank's usage of a shared ATM, which it does not own or rent, does not constitute the establishment and operation of a branch under Section 36(c) and (f) of the McFadden Act.

(25a.) The Second Circuit concluded that the language of §36, its prior interpretations by this Court, and Congress' longstanding commitment to "competitive equality" in banking all failed to provide a basis for classifying the Wegman's ATM as a "branch" "established and operated" by Marine. (19a-22a.) Accordingly, the court chose to accept and defer to the "owned or rented" regulation of the Comptroller, and thus elevated to decisional holding the parenthetical "own or rent" qualifier first appearing in the *IBAA v. Smith* opinion. (22a.) This deference to the Comptroller, however, was accorded only with serious misgivings:

> It is true that the Regulation uses a distinction that is perhaps arbitrary, even if it does track the language of *Smith*. Whether an ATM is "owned" or "rented" or simply "used" by a bank may be more a matter of how agreements are structured than a reliable determinant of whether or not the ATM constitutes a "branch."

(23a.)

The Second Circuit also disagreed with the District Court's alternative holding, which equated the "transaction fees" paid by Marine to Wegman's with "rent." Ignoring the private and instantaneous access to a customer's bank account which is obtained by Marine's payment of the "transaction fee", the Second Circuit opined:

> We do not agree that this is "rent" in any colloquial or legal sense of the word. The fees do not grant Marine, or the other participating financial institutions, any proprietary or leasehold interest in the machine—even on a temporary basis. The transaction fee is more akin to the charge incurred for a phone call. It is a per unit cost for electronic access, by multiple parties, to equipment owned and operated by another party.

(25a-26a.)

The Second Circuit vacated the District Court's permanent injunction against Marine.

REASONS FOR GRANTING THE WRIT

I. Whether ATMs Which National Banks Use But Do Not Own Are "Branches" "Established and Operated" Under the Act Is An Important Question of First Impression and National Significance Which Should Be Decided By This Court.

ATMs are one type of electronic customer-bank communication terminal ("CBCT") which banks employ in ever-increasing numbers for standard financial transactions with their customers. N. PENNEY & D. BAKER, THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS, ¶6.04[1] (1980 & Cum. Supp. 1984). The technological capabilities of ATMs continue to expand. Some ATMs now in use not only provide routine deposit, withdrawal and bill-paying functions for consumers, but also accept bulk deposits from commercial customers. *See, e.g., Bank of the North Shore v. FDIC,* 743 F.2d 1178, 1180 (7th Cir. 1984).

ATMs have been heralded as time and cost saving devices. Because of their functional capabilities, and lower operating costs, ATMs are rapidly being used by state and national banks to replace traditional "brick

and mortar" branch banks without sacrificing, and indeed increasing, consumer convenience. In recognition of this fact, the federal courts of appeal in the last decade have unanimously ruled that off-premises ATMs and other CBCTs which accept deposits, pay checks or lend money are "branches" under §36(f) of the Act.[4]

A national bank's "establishment and operation" of a "branch", be it a traditional brick and mortar branch, or an ATM, requires the approval of the Comptroller, and can only occur at those locations where state law specifically permits state banks to have branches or deploy ATMs. 12 U.S.C. §36(c), (e); *Northeast Bancorp, Inc. v. Board of Governors*, No. 84-363, slip. op. at 11 (U.S. June 10, 1985);[5] *IBAA v. Smith*, 534 F.2d at 948. These requirements preserve "competitive equality" between state and federal bank facilities at each location in the nation, in accordance with Congressional intent. *Walker Bank*, 385 U.S. at 257-61.

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[4] *IBAA v. Smith*, 534 F.2d at 948; *Illinois ex rel. Lignoul v. Continental Illinois Nat'l Bank and Trust Co.*, 536 F.2d 176, 179 (7th Cir. 1976), *cert. denied*, 429 U.S. 871 (1976); *Colorado ex rel. State Banking Board v. First Nat'l Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976) *cert. denied*, 429 U.S. 1091 (1976), *Missouri ex rel. Kostman v. First Nat'l Bank in St. Louis*, 538 F.2d 219, 220 (8th Cir. 1976), *cert. denied*, 429 U.S. 941 (1976).

[5] As this Court so recently recognized, "In enacting the McFadden Act in 1927, Congress relaxed federal restrictions on branch banking by national banks, but at the same time subjected them to the same branching restrictions imposed by the States on state banks. Congress intended to leave the question of the desirability of branch banking up to the States, and to permit branch banking by national banks in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking." *Id.* at 11 (citations omitted) (quoting *Walker Bank*, 385 U.S. at 258, and Sen. Glass, 76 CONG. REC. 2511 (1933)).

The Second Circuit's decision carves a loophole which allows national banks to circumvent completely this legislative and regulatory scheme. This is accomplished by artificially differentiating between ATMs which national banks own themselves and use, and those ATMs owned by others which national banks contract to use by paying a fee. If the decision is allowed to stand, every national bank will be free to use ATMs anywhere in the United States, so long as a third party owns the ATM, and so long as the national bank pays the third party for ATM use by a "transaction fee" which is not denominated as "rent."

The Second Circuit's decision produces significant and disturbing results which affect not only the parties to this action, but the entire banking industry.[6] The court's interpretation of §36 allows national banks using ATMs to avoid all state law limitations on ATM placement, and thus destroys competitive equality between state and national banks. Approximately 40 of the 50 States have branch banking laws which demarcate the locations where ATMs may be utilized by state banks. N. PENNEY & D. BAKER, ¶22.01[2] (1980 & Cum. Supp. 1984). Prior to the Second Circuit's decision, §36 of the Act had been interpreted to make these state legislative policy choices and restrictions concerning branch banking and ATM placement fully applicable to national banks:

> The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that

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[6] In recent years, the Court has granted certiorari in cases which involve the construction of a statute having a wide impact on the financial services industry. *See, e.g., Northeast Bancorp, Inc.*, No. 84-363, slip op. at 1 (U.S. June 10, 1985); *Securities Industry Ass'n v. Board of Governors*, _____ U.S. _____, 104 S.Ct. 2979, 2983 (1984).

> congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.

Plant City, 396 U.S. at 133; *see also IBAA v. Smith*, 534 F.2d at 936, 948. If third party-owned ATMs which national banks contract to use are able to avoid classification as "branches" "established and operated" under §36 of the Act, they also avoid all of the state branching and ATM deployment restrictions which would otherwise be applicable to them. Under this approach, competitive *equality* is supplanted by a decided competitive *advantage* for federally chartered banks.

Marine's ability to use Wegman's ATM in Canandaigua following the Second Circuit's decision to dissolve the District Court's injunction graphically illustrates the circumvention of state branch banking laws and the loss of competitive equality in New York.[7] Marine conceded that New York Banking Law §§105 and 105-a prohibit it from constructing a brick and mortar branch or deploying its *own* ATM in Canandaigua. However, the Second Circuit's decision permits Marine to carry on the identical banking transactions through *Wegman's* ATM which Marine otherwise would be barred from performing, and which its state bank competitors cannot provide at the same location, by reason of §§105 and 105-a. This anomaly, the District Court reasoned, results from an improper focus upon the form of ATM ownership, rather than upon the substance of the banking activities which are carried on at the ATM. (43a.) Statutory interpretations and legal outcomes which

[7] The Second Circuit's decision will also wreak havoc with the competitive equality balance in all other States which impose geographic or functional restrictions on ATM deployment and use.

place form over substance have not, in other contexts, received the imprimatur of this Court,[8] and should not here.

Petitioners' interpretation of the Act—that Marine's private contractual arrangement with Wegman's, which enables Marine customers to use the ATM on a transaction fee basis, does constitute the "establishment and operation" of a "branch"—preserves competitive equality between state and federal banks at each different location within New York. In Canandaigua and the other home office protected communities, no state or national banks other than the home office protected bank may use an ATM. Conversely, in New York City, Buffalo, Rochester and the other major markets without home office protection, use of an ATM would be permissible for Marine (and other national or state banks in New York), upon proper application to, and approval from the Comptroller. 12 U.S.C. §36(c).[9]

Another adverse effect of the Second Circuit's decision is that interstate deposit gathering by national banks, a practice long prohibited under §36 in order to prevent capital concentration in the hands of a few large banks, could be systematically undertaken through ATMs used

[8] *See, e.g., Griffiths v. Helvering*, 308 U.S. 355, 357-58 (1939); *Weiss v. Stearn*, 265 U.S. 242, 254 (1924).

[9] The New York Legislature's adoption of "home office protection" for some communities was rooted in concern over the loss of deposits from rural areas and small municipalities if larger money center institutions were allowed to branch in these communities. *See Report of the Joint Legislative Committee on Banking and Investment Trusts*, 17 NEW YORK LEGIS. DOCUMENTS, No. 70 at 25, 157th Session (1934). "Home office protection" was recently reaffirmed by the Legislature in its amendment of New York Banking Law §105-a (1984 N.Y. Laws, chap. 360, §29,) and in any event is a state legislative policy judgment to which Congress chose to defer in enacting §36(c) of the Act. *See Northeast Bancorp*, No. 84-363, slip op. at 11 (U.S. June 10, 1985).

but not owned by national banks, without regard for state boundaries or branching prohibitions, and without the slightest oversight by the Comptroller.[10] One hypothetical will illustrate this specter.

Citibank and Bank of America could enter into a contract with the Southland Corporation to utilize ATMs owned by Southland and placed in every "7-11" convenience store in the United States. The two banks would pay Southland a transaction fee each time their customers use the ATMs. The ATMs could then be used to siphon off deposits from metropolitan areas, small towns and other banks across the nation, with all transactions processed and switched at a data processing facility owned by either bank. Under the Second Circuit's holding, this "shared use" of the ATMs without ownership by either user bank,[11] would be entirely

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[10] The economic threat posed by the deposit gathering capabilities of ATMs is very real. The aggregate dollar volume of deposits at ATMs exceeds the aggregate dollar volume of withdrawals by more than a 2 to 1 margin. N. PENNEY & D. BAKER, ¶6.04[1]; *see also* Testimony of George W. Hamlin, IV, *Hearings Before the Senate Committee on Banking, Housing and Urban Affairs on S. 2898*, S. Hrg. 98-1011 at 91-92 (September 19-20, 1984) (CNB's ATM in Canandaigua collected more deposits than it gave withdrawals in a ratio of more than 2 to 1).

[11] Third party ownership buttressing a §36(c) loophole could take a variety of other forms. For example, under the Second Circuit's opinion, a membership corporation whose members are all national banks could own a network of ATMs, which would be used on a transaction fee basis by the member banks. How extraordinary that conduct (*i.e.*, establishment of an ATM), which would require Comptroller approval and state law compliance if done by any single member, can be transmuted into conduct wholly unregulated and impervious to state law, simply because several national banks are doing it in concert through another entity, rather than individually.

(Footnote continued on following page)

permissible, because wholly insulated from the state branch banking restrictions incorporated into §36(c). The potential is enormous for drastically increased concentration of the banking industry, and the demise of community-based independent banks through erosion of their deposit bases. Such a debacle should not be allowed to result from a misinterpretation of the statute designed by Congress to preserve a vibrant dual system of state and national banks.

No other courts have had occasion to decide whether third party ownership of an ATM provides a loophole in §36 of the Act for national banks wishing to expand their operations into previously forbidden markets. Accordingly, the Court should grant certiorari to determine this important issue of statutory interpretation, reverse the decision of the Second Circuit, and reinstate the District Court's injunction against Marine.

II. The Second Circuit's Decision Conflicts With Prior Decisions of This Court

A. Conflict With *Plant City* and *Walker Bank*

Just 16 years ago this Court interpreted §36 of the Act in *Plant City*, 396 U.S. 122 (1969). In that case a national bank argued that its roving armored car, and a stationary

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(Footnote continued from preceding page)

Even the Comptroller never envisioned wholesale disregard of state branching laws by shared ATM network participants. His regulation contemplates that at least one national bank using a shared ATM would be filing an application with him, so that he may exercise his statutory responsibility under §36(c) to determine whether the location and scope of such ATM use are permitted by the applicable state law. 12 C.F.R. §5.31(g)(4) (1982). (3a.) Here, neither Marine as ATM user nor Wegman's as a non-bank ATM owner has applied for Comptroller approval for the Canandaigua ATM.

deposit receptacle placed in a shopping center were not "branches" of the bank under §36(f), and hence could be used by the bank even though Florida law prohibited branch banking. The Comptroller had ruled that neither the armored car nor the deposit receptacle was a "branch", and therefore both were permissible.

In the decision of the Court, Chief Justice Burger reiterated the conclusion stated by the Court three years earlier in *Walker Bank*: by enacting §36, "Congress has deliberately settled upon a policy intended to foster 'competitive equality' " between state and federal banks at any given location. "Neither system [is to] have advantages over the other in the use of branch banking." *Plant City*, 396 U.S. at 131. To achieve competitive equality, the definitions within the Act were given a "calculated indefiniteness" and must be construed broadly. *Id.* at 135. Because the armored car and deposit receptacle enabled the national bank to collect deposits where state banks were forbidden to do so, the Court found that the national bank had a competitive advantage, and held that both the car and the receptacle were "branches" prohibited by state and federal law. The Comproller's ruling upon which the national bank had relied was overturned, with the following directive:

> [T]he term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

Id. at 135. (emphasis in original).

By bringing "any place" used by a national bank within the ambit of the Act, the Court read into §36 the elasticity necessary to maintain this statute's vitality even in the wake of technological advances, which in effect have transformed the deposit receptacle used by

the *Plant City* bank into the computerized ATM used by Marine in Canandaigua.

Despite the clear directive from this Court that §36 be construed broadly to keep pace with technology and prevent circumvention of its underlying purpose, Marine contends and the Comptroller has declared that the words "establish and operate" in §36(c) mean "own or rent", and nothing more. With reluctance, the Second Circuit adopted this restrictive meaning for the statutory terms. (23a.) In so doing, the Second Circuit chose to depart from this Court's admonition to interpret broadly the terms of §36, which are imbued with a "calculated indefiniteness." Instead, the Second Circuit opted for an easy to apply, but substantively flawed "bright line" property interest test. (24a.) Applying this property interest test, the Second Circuit held that Wegman's ATM it utilized by Marine customers on a transaction fee basis, was not a "branch" "established and operated" by Marine. (25a.)

The Second Circuit's holding in this case directly calls into question the continued vitality of §36 and this Court's decision in *Plant City*. Applying the logic of the Second Circuit's decision, the deposit receptacle in *Plant City*, if owned by the shopping center rather than the bank, would not have been labeled a "branch", even though it performed identical banking functions.

As the District Court concluded, to hinge opposite outcomes on whether a national bank has a property interest in a banking device, epitomizes "the proverbial distinction without a difference." (43a.) The Second Circuit's "arbitrary" "bright line" test, which differentiates between third party-owned ATMs used by national banks and those ATMs owned by national

banks is irreconcilable with the "calculated indefiniteness" infused into §36 by Congress, and held by this Court to circumscribe "any place" where a national bank conducts a banking business. *Plant City*, 396 U.S. at 135. The Second Circuit's departure from this Court's prior interpretation of §36 cannot be allowed to stand.

B. Conflict With Other Decisions of This Court

1. ***Improper deference to the Comptroller***

"[A]dministrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" are not entitled to any weight or deference and must be rejected. *Securities Industry Ass'n*, 104 S.Ct. at 2983 (1984); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

In reaching its decision, the Second Circuit ignored this maxim and improperly accorded great weight to the Comptroller's 1982 regulation (12 C.F.R. §5.31(b)), which restricts the applicability of §36 to those CBCTs which are "owned or rented" by a national bank. (3a.) By narrowing the reach of §36 in this way, the Comptroller's regulation plainly frustrates the Congressional intent embodied in §36, which was to bring "*any* place" at which substantive banking transactions occur within the regulatory scope of the Act, so that state branch banking laws and the policy of competitive equality can be implemented by the Comptroller in the application process. *Plant City*, 396 U.S. at 135.

Under the Act, the Comptroller is expressly entrusted with the duty to review and approve or disapprove applications for new national bank branches based upon the provisions of state statutory banking law. 12 U.S.C.

§36(c), (e); *First National Bank of Fairbanks v. Camp*, 465 F.2d 586 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973). His role in this regard is important, but ministerial. He has been specifically prohibited by Congress from promulgating regulations under §36 of the Act, and hence cannot alter the statutory definitions in §36, or formulate his own branch banking policy for ATMs. 12 U.S.C. §93a (1982); *see Securities Industry Ass'n*, 104 S.Ct. at 2989; *Conference of State Bank Supervisors v. Lord*, 532 F.Supp. 694, 696 (D.D.C. 1982), *aff'd sub nom. Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 881 (D.C. Cir. 1983).

The Comptroller has repeatedly borne judicial rebuke for his attempts to expand branching rights for national banks without Congressional authorization. His 1982 regulation at issue here is another such attempt and therefore warrants no deference. In several notable instances, this Court and others have had to rein in the Comptroller, chiding him that his responsibility is to carry into effect the will of Congress—not to make new branch banking policy. *Walker Bank*, 385 U.S. at 261; *Plant City*, 396 U.S. at 138; *IBAA v. Smith*, 534 F.2d at 950, 951; *First Union Bank and Trust Co. of Winamac, Indiana v. Heimann*, 600 F.2d 91, 99 (7th Cir. 1979), *cert. denied sub nom. First National Bank of Monterey v. First Union Bank & Trust Co. of Winamac, Indiana*, 444 U.S. 950 (1979). As the District Court concluded (42a.), but the Second Circuit failed to recognize (22a.), a federal agency which has consistently failed to apply and properly interpret a statute is not an authority to whom the courts should unhesitatingly defer in resolving a question of statutory interpretation. *See United States of America v. University Hospital of New York at Stony Brook*, 729 F.2d 144, 154 (2d Cir. 1984); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1329-30 (11th Cir. 1983).

Even were it authorized by Congress, the Comptroller's interpretation of the "establish and operate" language in §36(c) would be suspect, because it directly conflicts with the interpretation of the same section adopted by the Federal Reserve Board. In *Michigan National Corp.* ("MNC"), 64 Fed. Res. Bull. 127 (Feb., 1978), the Board was asked to determine whether an "accommodation transaction service" ("ATS"), used in common by several independent national banks which were all owned by a single bank holding company (MNC), constituted the "establishment and operation" of "branch" banks under §36(c) by each user bank at each different location.

Expressly relying on this Court's decision in *Plant City*, the Board held that:

> By virtue of the agreement among MNC banks to offer ATS, each bank has in substance a place away from its main office for the performance, on a systematic basis, of banking services for its customers and a resulting advantage over other banks in competition for customers. In the Board's opinion, the agreements among the MNC banks to furnish ATS adequately satisfy the "establish" and "operate" provisions of the Federal branching laws.

Id. at 132. The Board's conclusion, though not intended for universal application,[12] bespeaks the grave differences in the interpretation of §36(c) which exist between the two agencies generally charged with administrative application of the Act.[13] Under the Board's interpretation

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[12] The Board stated that its decision was "not necessarily applicable in other jurisdictions or on other facts." *Id.* at 132.

[13] "The Board is the agency responsible for federal regulation of the national banking system . . .". *Securities Industry Ass'n*, 104 S.Ct. at 2983. "The Comptroller of the Currency is charged with the enforcement of the banking laws . . .". *Investment Co. Institute v. Camp*, 401 U.S. 617, 627 (1970).

of §36(c), Marine has "established and operated" a branch at the ATM by virtue of its "agreement" with Wegman's "to furnish" ATM use for its customers, thus creating "in substance a place away from its main office for the performance, on a systematic basis of banking services" and "a resulting advantage over other banks in competition." *Id.*

Because even the two agencies charged with responsibility for administering the Act have not agreed upon a singular interpretation of the phrase "establish and operate", this Court should grant certiorari, and provide a definitive interpretation of §36(c).

2. Improper imputation of Congressional acquiescence to the Comptroller's regulation

The Comptroller's "owned or rented" limitation on the scope of §36 was not codified into regulation until July 9, 1982. 47 Fed. Reg. 29826, codified at 12 C.F.R. §5.31.[14] The factual circumstances giving rise to this case coalesced less than one year later, and the matter was then promptly placed before the District Court. Despite the recent issuance of the Comptroller's regulation, the Second Circuit nevertheless stated that "the consequences of legislative inaction, it seems to us, work against plaintiffs who are swimming against the current

[14] The direction in which the Comptroller intended to move on this issue was foreshadowed in the commentary accompanying a new regulation following the *IBAA v. Smith* decision in 1976, and in two staff interpretive letters issued in 1980 and 1981. *See* 41 Fed. Reg. 8333 (Nov. 3, 1976); Comptroller Staff Interpretive Letter No. 153 (July 7, 1980), [1981-82 Transfer Binder] FED. BANKING L. REP. (CCH) ¶85,234; Comptroller Staff Interpretive Letter No. 188 (May 12, 1981), [1981-82 Transfer Binder] FED. BANKING L. REP. (CCH) ¶85,269.

of technological development." (25a.)[15] The Second Circuit then foisted back onto Congress the burden of taking legislative steps to halt the Comptroller's march toward full and unregulated use of shared ATMs by national banks:

> [I]f the momentum already developed should be stopped, it should be done by Congress, and not by this court . . . . Should Congress find itself in disagreement with the Comptroller's Regulation, which we accept as a legitimate interpretation of the governing statute, a legislative solution is available.

(25a.)

By attributing substantial significance to the absence of a Congressional response to the promulgation of the Comptroller's regulation, the Second Circuit ignored applicable decisions of this Court. This Court has consistently cautioned that "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n. 11 (1969). Under the Second Circuit's new approach, the validity of a regulation depends not on whether it is inconsistent with Congressional intent, but whether Congress has chosen to overrule or replace it.

There was only one year between the promulgation of the Comptroller's regulation and the commencement of this action. Given the plethora of regulations of every

[15] Petitioner CNB emphatically is *not* "swimming against the current of technological development." CNB implemented full function ATM facilities with 24 hour per day availability in Canandaigua in 1981—two years before Marine and Wegman's installed their ATM. *See* Testimony of George W. Hamlin, IV, *Hearings Before the Senate Committee on Banking, Housing and Urban Affairs on S. 2898* S. Hrg. 98-1011 at p. 91 (September 19-20, 1984). The issue in this case is not *whether* ATMs will see increased use by national banks, but rather *where* and by *whom* such technology will be permitted under state and federal law.

description which continually spew forth from all federal agencies, and its own crowded agenda of pressing national and international concerns, Congress' failure to specifically and immediately respond to this Comptroller's regulation can hardly be regarded as significant.[16] This Court has not and should not permit interpretations of longstanding federal statutes and the resolution of significant issues of national banking policy to hinge upon uncertain implications drawn from the vicissitudes of the legislative process. Rather, it is the Court's time-honored responsibility to construe the language of the actual branch banking statute which Congress did enact—not the language which the Comptroller and Marine wish it had adopted.

If significance is to be accorded to any Congressional inaction, it is best given to the fact that Congress has chosen not to amend §36 of the Act since 1933—despite the several major judicial interpretations of §36 which have been contrary to the Comptroller's espoused positions.[17] If Congress were of the collective opinion that the definition of "branch banking" expressed in §36 should be narrowed, it has had ample opportunity to do so during the last 52 years.

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[16] There is no provision in the Act requiring the Comptroller to submit his regulations to Congress for approval or disapproval prior to promulgation. *Cf. Democratic Senatorial Campaign Comm.*, 454 U.S. at 34 (Federal Election Campaign Act of 1971 does require transmission to Congress of proposed FEC rules prior to promulgation). Indeed, because Congress *forbade* the Comptroller to prescribe regulations under §36 of the Act, 12 U.S.C. §93a (1982), it cannot be Congress' additional responsibility to "veto" each forbidden regulation that the Comptroller does issue.

[17] In fact, the implication to be drawn from the Congressional process is that §36 of the Act as crafted in 1927 and modified in 1933 remains the branch banking policy of the nation. Congress has chosen not to tinker with §36(c) or (f) despite administration suggestions that it do so. *See* N. PENNEY and D. BAKER, ¶22.01[4] (1980 and 1984 Cum. Supp.) (Recommendations to amend the Act to "liberalize" ATM

(Footnote continued on following page)

III. The Second Circuit's Decision Conflicts With Prior Court of Appeals Decisions Related to CBCTs.

A. Misapplication of the D.C. Circuit's Decision in *IBAA v. Smith*

In 1974, the Comptroller issued an interpretive ruling purporting to exclude all CBCTs (including ATMs) from the definition of "branch" under §36 of the Act. 39 Fed. Reg. 44416 (December 24, 1974). In a suit brought by the Independent Bankers Association of America, the D.C. Circuit Court of Appeals struck down the Comptroller's ruling, and held that:

> [R]egardless of private contract law and superficial form, any facility that performs the traditional bank functions of receiving or disbursing funds is a "branch" of a national bank within the meaning of section 36(f) if (1) the facility is established (*i.e.* owned or rented) by the national bank, and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks (national or state) that do not operate similar facilities.

IBAA v. Smith, 534 F.2d at 951-52.

(Footnote continued from preceding page)

deployment, made by the National Commission on Electronic Fund Transfers and by a Congressionally-mandated Task Force, have not been implemented by Congress).

The adverse reaction in some banking quarters to the District Court's decision in this case found some expression in a bill introduced in the Senate in 1984, known as "The Banking Convenience Act of 1984", (S. 2898). 130 CONG. REC. 9609 (Aug. 1, 1984). However, the hearings held on this bill before the Senate Banking, Housing and Urban Affairs Committee on September 19-20, 1984 evidenced sharp disagreement within the banking community on this issue, and hence the legislation never reached committee vote. *Hearings Before the Senate Committee on Banking, Housing and Urban Affairs on S. 2898*, S. Hrg. 98-1011 (September 19-20, 1984).

The Second Circuit in its opinion below, like the Comptroller in his regulation, ignored both the overall thrust and substantive analysis by the D.C. Circuit, and elevated the "owned or rented" parenthetical appearing at the end of the 30 page opinion in *IBAA v. Smith* into an "arbitrary" "bright line" test of an ATM's status as a "branch." The phrase "own or rent", the Second Circuit apparently concluded, exhausts the meaning of the word "establish" in §36(c). (24a.) The Second Circuit's narrow view of the *IBAA v. Smith* precedent and the word "establish" in §36(c) simply does not withstand careful analysis, and compels review by this Court.

Before using the "owned or rented" parenthetical in *IBAA v. Smith*, the D.C. Circuit observed that:

> The Comptroller has not successfully distinguished this case from the facts and law of *Plant City*. His efforts to circumvent the federal definition of "branch" fail because they focus primarily upon (1) the meaning of private contractual arrangements rather than the meaning of section 36(f), and (2) the form of CBCT transactions, rather than their substance.

Id. at 951. The Second Circuit's reasoning for its decision contains these same two fundamental flaws. First, if the application of §36(c) to any particular ATM turns on a mere "property interest" test, then, to use the Second Circuit's own words, "[w]hether an ATM is 'owned' or 'rented' or simply 'used' by a bank may be more a matter of how agreements are structured than a reliable determinant of whether or not the ATM constitutes a 'branch.' " (23a.) Because an 'owned or rented' rule is not wholly reliable and can be contractually circumvented, this Court should not allow it to be adopted as the

substantive replacement for the broader "establish and operate" test provided by Congress in the statute itself.[18]

Second, the Second Circuit looked at the form of the ATM transactions, and attached great significance to Wegman's provision of some operational services for the ATM. (8a, 24a.) Wegman's operational services, however, do not alter the fundamental fact that the banking transactions at Wegman's ATM occur *not* between a Marine customer and Wegman's as owner of the ATM, but rather between a Marine customer and Marine as his bank. Because the customer "banks" with Marine at the ATM, there should be no difference between the legal status of a transaction at a Marine-owned ATM in Canandaigua (which concededly is *not* lawful), and a transaction which occurs at a Wegman's-owned ATM (which the Second Circuit has held *is* lawful).

In short, the functional and substantive tests applied by the D.C. Circuit in *IBAA v. Smith* were ignored by the Second Circuit, and produced the wrong outcome in this case. Review of the Second Circuit's decision by this Court is therefore required, in order to conform the result in this case with the *IBAA v. Smith* decision.

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[18] The Second Circuit ignored the fundamental principle that the language employed by Congress in a statute provides the touchstone for its own interpretation, and "must ordinarily be regarded as conclusive." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *See also Richards v. United States*, 329 U.S. 1, 9 (1962).

B. Conflict With Decisions of Other Circuit Courts

The "owned or rented" language used parenthetically by the D.C. Circuit in *IBAA v. Smith*, and deemed so important by the Comptroller and the Second Circuit, is conspicuously absent from the decisions of the other circuit courts which held that CBCTs were "branch" banks. *Illinois ex rel. Lignoul*, 536 F.2d 176; *Colorado ex rel. State Banking Board*, 540 F.2d 497; *Missouri ex rel. Kostman*, 538 F.2d 219.

In 1979, three years after the decisions in *IBAA v. Smith* and the other circuit cases, the Eighth Circuit revisited the issue. It too, however, made no mention of the "owned or rented" property interest test. Instead, the court stated that national bank use of a CBCT was the key criteria for branch banking under §36:

> [I]t is now settled beyond question that when a national bank *makes use* of a CBCT, it is engaging in "branch banking," at least where the CBCT is located away from the bank's main business premises.

State Bank of Fargo v. Merchants National Bank and Trust Co. of Fargo, 593 F.2d 341, 344 (8th Cir. 1979) (emphasis added).

Because the Second Circuit's decision below refuses to recognize a national bank's contractual provision of ATM access for its customers as the "establishment" of a "branch", it conflicts with the view of the other circuit courts of appeal, and should be reviewed.

Conclusion

For the foregoing reasons, the requested Writ of Certiorari should issue.

Respectfully submitted,

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June 28, 1985

APPENDIX A

Text of Statutes and Regulation Involved

Section 36 of the National Bank Act, 12 U.S.C. §1 *et seq.*, provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, *establish* and *operate* new branches:
>
> (1) . . .
>
> (2) at any point within the State in which said association is situated, if such *establishment* and *operation* are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

(emphasis added).

> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

New York Banking Law §105 provides in relevant part:

> 1. No bank or trust company or officer, director, agent or employee thereof, shall transact any part of its usual business of banking at any place other than its principal office, except that *a bank or trust company may open and occupy one or more branch offices at any location in the state, provided:*
>
> (i) . . .

> (ii) *that,* except for the city or village in which its principal office is located, *in no event shall a branch be opened and occupied* pursuant to this subdivision *in a city or village with a population of fifty thousand or less in which is already located the principal office of another bank,* trust company, *or national banking association,* . . . .

(emphasis added).

New York Banking Law §105-a (as amended, effective October 8, 1984 by 1984 N.Y. Laws, chap. 360, §29) provides:

> A bank or trust company, pursuant to resolution duly adopted by a majority of its board of directors, may conduct a banking business, at *automated teller machines,* point-of-sale terminals, and similar facilities subject to regulations which may be promulgated by the banking board. Such facilities shall not be deemed to be branches and shall not be subject to any of the provisions of this chapter, applicable to branches; provided however that notwithstanding the foregoing, *for purposes of clause (ii) of subdivision one of section one hundred five of this chapter,* such facilities *shall be deemed to be branches, and such facilities shall be subject to the terms and conditions of section one hundred five,* and for purposes of section twenty-eight of this chapter, such facilities shall be deemed to be branches.

(emphasis added).

Appendix A—Text of Statutes and Regulation Involved.

The Comptroller's 1982 regulation at 12 C.F.R. §5.31 states in pertinent part:

> (b) *Definition.* A "CBCT branch" is an automated device established (i.e., owned or rented) by a national bank at a location separate from the main office or a domestic branch that:
>
> (1) Takes deposits, or
>
> (2) Disburses cash drawn against:
>
> (i) A customer's deposit account, or
>
> (ii) A customer's pre-approved loan account.
>
> (g) . . .
>
> (4) If a national bank proposes to establish a CBCT branch jointly with one or more national banks or other financial institutions, only one of the national banks must submit an application as agent for all the national banks in the group of financial institutions proposing to share the CBCT branch. The application must indicate in an attachment the names and head office addresses of all the national banks that propose to establish jointly the CBCT branch. A national bank that arranges for its customers to use another financial institution's automated teller device on a transactional fee basis does not require a separate CBCT branch application.

APPENDIX B

Decision of United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 189, 222 — August Term, 1984

(Argued: December 6, 1984 Decided: February 27, 1985)

Docket Nos. 84-7424, 84-7448

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., THE CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,

Plaintiffs-Appellees, Cross-Appellants,

—against—

MARINE MIDLAND BANK, N.A., WEGMANS FOOD MARKETS, INC.,

Defendants,

MARINE MIDLAND BANK, N.A.,

Defendant-Appellant,

WEGMANS FOOD MARKETS, INC.,

Defendant-Cross-Appellee.

Before:

FEINBERG, *Chief Judge*, NEWMAN and PRATT, *Circuit Judges.*

Appeal and cross-appeal from judgment of the United States District Court for the Western District of New

York enjoining defendant Marine Midland Bank from using an automated teller machine owned by defendant Wegmans Food Markets, and dismissing plaintiffs' claim that Wegmans' operation of the machine violates New York Banking Law.

Judgment reversed on the federal claim; judgment on the state claim vacated and complaint dismissed.

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FEINBERG, *Chief Judge:*

Defendant Marine Midland Bank, N.A. (Marine) appeals from a judgment of the United States District Court for the Western District of New York, Michael A. Telesca, J., enjoining it from using an automated teller machine (ATM) owned and operated by Wegmans Food Markets Inc. (Wegmans) and located in Wegmans' store in Canandaigua, New York. 583 F. Supp. 1042 (W.D.N.Y. 1984). The judgment was entered on a motion for summary judgment in a suit brought by plaintiffs Independent Bankers Association of New York State, Inc. (Bankers Association) and the Canandaigua National

Bank and Trust Company. The district court held that Marine's use of the ATM constituted unauthorized branch banking under applicable federal law. Plaintiffs cross-appeal from the court's dismissal of their pendent claim; the court held that defendant Wegmans' ownership and operation of the ATM did not violate state banking law. For reasons stated below, we reverse on the federal claim and dismiss the pendent state claim.

I. Facts

Marine is a federally chartered bank. Wegmans owns a chain of grocery stores, including 31 at which it has installed an ATM. Wegmans made these electronic banking services available in order to attract customers and support a high-volume grocery business. In January 1983, Marine entered into an agreement with Wegmans that permitted Marine depositors to use the ATM located in the Wegmans Canandaigua store. Canandaigua has a population of approximately 11,000, and is the principal office of plaintiff Canandaigua National Bank.

The ATM in the Canandaigua store has Wegmans' logo on it, is under Wegmans' control and is a shared ATM, that is, it may be used by many financial institutions. Marine's account-holders may use the ATM to make deposits and cash withdrawals, obtain cash advances against credit cards, transfer funds between accounts, pay bills and obtain account balance information.

Wegmans is obligated under the agreement with Marine to load the machine with cash, provide deposit envelopes and other customer forms, issue transaction receipts, unload and deliver deposit containers and provide security, insurance and maintenance services.

To use the machine, a customer inserts an encoded plastic card and enters a personal identification number on the machine's keyboard. The customer then enters the desired transaction and amount. Deposits are placed in envelopes marked "Wegmans Electronic Teller Deposit/ Payment Envelope" and dropped through a slot in the machine into a secured deposit box maintained by Wegmans. The customer receives a receipt marked "Electronic Teller Wegmans", which reflects the amount indicated on the keyboard. Account withdrawals must first be approved electronically, and cash is then disbursed by the machine.

Marine, Wegmans and several financial institutions are members of a shared ATM network known as HarMoney. HarMoney's members share the use of central computer processing facilities—a "switch"—owned by Marine. Customers of the member institutions can use other members' ATM's to transact business with their own institutions. Wegmans also belongs to another shared ATM network, Metroteller, which has 45 financial institution members in New York and other states. The crediting and debiting of the accounts of customers who use the Wegmans machine occurs through a series of transactions involving the relevant switch.

Plaintiff Bankers Association is a non-profit association of over 90 member banks, including plaintiff Canandaigua National Bank. Plaintiffs brought suit in the Western District in September 1983, alleging that Marine's use of Wegmans' ATM constituted branch banking under the McFadden Act, 12 U.S.C. § 36(f), and thus violated section 36(c) of the Act, which incorporates by reference the restriction on branch banking contained in New York Banking Law § 105. This section prohibits a bank from

opening a branch in any community with a population of 50,000 or less that is the principal office of another bank (home office protection). Plaintiffs included a second, pendent state claim against Wegmans, alleging that it was conducting a banking business, although not authorized to do so, in violation of New York Banking Law § 131.1. Plaintiffs sought declaratory and injunctive relief.

Wegmans moved to dismiss the pendent state claim for lack of subject matter jurisdiction. In an opinion reported at 575 F. Supp. 1425 (W.D.N.Y. 1983), the district court denied the motion, holding that the facts alleged were sufficient to confer pendent jurisdiction. Plaintiffs and defendant Marine each moved for summary judgment; in April 1984, the district court granted plaintiffs' motion on the federal claim. The court permanently enjoined Marine from utilizing the Wegmans ATM in Canandaigua for Marine bank account and credit card account transactions; the court held that such use constituted unlawful branch banking under the applicable provisions of the McFadden Act. On the pendent state claim, the court granted summary judgment for Wegmans on the ground that Marine was doing the banking, and Wegmans, at most, was "acting as an agent for a bank, and not as a banking institution itself." 583 F. Supp. at 1049. This appeal by Marine and cross-appeal by plaintiffs followed.

II. Background

Analysis of the issues before us requires a description of the statutory scheme. The McFadden Act authorizes national banking associations to "establish and operate new branches" to the extent permissible for state banks

under state law. 12 U.S.C. § 36(c). The term "branch" is defined by the Act

> to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f).[1] Such branches may be established "with the approval of the Comptroller of the Currency . . . at any point within the State in which said [banking] association is situated," 12 U.S.C. § 36(c)(2). The relevant state law incorporated by reference in this case permits banks to "open and occupy one or more branch offices" within the state, but, as already indicated, the state law also provides for home office protection. New York Banking Law § 105.[2] It is this restriction that

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[1] The relevant portions of subsections (c) and (f) of section 36 provide:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, *establish and operate new branches*:
>
> (1) . . . .
>
> (2) at any point within the State in which said association is situated, if such *establishment and operation* are at the time authorized to State Banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks.*
>
> (d) . . . .
>
> (e) . . . .
>
> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which *deposits are received, or checks paid, or money lent.* (emphasis supplied)

[2] Section 105 provides in relevant part:

> 1. No bank . . . shall transact any part of its usual business of banking at any place other than its principal office,

[Footnote continued on following page]

Marine violated, according to the district court, by establishing its "branch" in Canandaigua through use of the Wegmans ATM.

The McFadden Act was an amendment to the National Bank Act, which was enacted in 1864 and governs the establishment and operation of federally chartered banks. The McFadden Act was passed in 1927, and amended in 1933, as part of a Congressional effort to strengthen national banks and enable them to compete on an equal footing with their state-chartered counterparts. Faced with the expansion of state banks, which were permitted to open branches by recently liberalized state laws, many banks had withdrawn from the Federal Reserve System. 65 Cong. Rec. 11297 (1924). The McFadden Act was designed, in part, to stem this tide by granting similar privileges to national banks. See *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), reviewing the history of the McFadden Act.

The compromise that emerged from the Congressional debates incorporated the branching laws of the states into the National Bank Act. National banks were authorized to open branches only "if such establishment and operation [were] at the time authorized to State banks by the statute law of the State in question. . . ." 12 U.S.C.

[Footnote continued from previous page]

except that a bank or trust company may open and occupy one or more branch offices at any location in the state, provided: . . . (ii) that, except for the city or village in which its principal office is located, in no event shall a branch be opened and occupied pursuant to this subdivision in a city or village with a population of fifty thousand or less in which is already located the principal office of another bank, trust company or national banking association . . .

§ 36(c). However, Congress retained some federal authority over branching by including the definition of "branch" in the statute, 12 U.S.C. § 36(f). *See supra* note 1. In *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), the Court held that the threshold question of what constitutes a "branch" is governed by federal, not state, law and noted that the definition "must not be given a restrictive meaning which would frustrate the congressional intent . . . ." 396 U.S. at 134. The reason is that

> to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result . . . .

396 U.S. at 133, 134.

Determination of whether a particular banking practice constitutes "branching" under sections 36(c) and (f) is thus the task of the federal courts, and it has proved to be a thorny one. Banking, like other industries, has changed radically since the McFadden Act was passed in 1927. "Brick and mortar" banking, with a single physical locus of bank-customer transactions, has been supplemented by many other forms of communication that could not have been contemplated in 1927. In the past two decades in particular, the industry has been transformed by the advent of computer technology. N. Penney & D. Baker, The Law of Electronic Fund Transfer Systems ¶ 1.01 (1980); Fraser, Structural and Competitive Implications of Interstate Banking, 9 J. Corp. L. 643 (1984).

In 1969, the Supreme Court concluded that a mobile armored car and an off-premises deposit receptacle, both

owned and operated by a bank, constituted branch banking under section 36(f). *Plant City, supra.* Seven years later, in *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976), the questions raised were more complex. The Office of the Comptroller of the Currency (Comptroller), charged with enforcement of the National Bank Act, had issued an interpretive ruling in 1974 authorizing national banks to establish off-premises customer-bank communication terminals (CBCT's) without regard to the restrictions on branching contained in federal law. (We are informed by the Comptroller that an ATM is one form of a CBCT.) The Comptroller's position was that CBCT's were basically means of communication, not places where the banks transacted business, and were therefore not "branches" within the meaning of section 36(f) of the McFadden Act. 39 Fed. Reg. 44,416 (Dec. 24, 1974); 12 C.F.R. § 7.7491 (1975).

The legality of this ruling was challenged by numerous parties, and the district court held the ruling invalid and enjoined its implementation. On appeal, the District of Columbia Circuit examined this new computer banking technology, analyzing each of the terminal's functions and comparing it to the definitional terms in Section 36(f) of the Act, quoted above. The court concluded that

> any facility that performs the traditional bank functions of receiving or disbursing funds is a 'branch' of a national bank within the meaning of Section 36(f) if (1) the facility is *established* (*i.e., owned or rented*) *by the national bank*, and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks

(national or state) that do not operate similar facilities. (emphasis supplied)

Smith, supra, 534 F.2d at 951-52. Accordingly, the court held that the Comptroller's interpretive ruling was invalid. Thereafter, several circuits followed the reasoning of *Smith* and held that similar terminals established by national banks were branches and thus subject to federal and state restrictions on branch banking. *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *Missouri ex rel. Kostman* v. *First National Bank in St. Louis*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank and Trust Co.*, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *see also State Bank of Fargo* v. *Merchants National Bank and Trust Co.*, 593 F.2d 341, 344 (8th Cir. 1979).

Smith, however, did not stem the tide of change in banking practices. It comes as no surprise that the economic pressure for modernization of banking has not receded. In the words of one treatise, the "payment systems genie that has been released from the electronic bottle" has refused to disappear. N. Penney & D. Baker, *supra*, ¶ 1.01 at 1-2. As might be expected, *Smith* also failed to end the legal battles growing out of the new technology.

Shortly after the Supreme Court denied certiorari in *Smith*, 429 U.S. 862 (1976), the Comptroller issued regulations governing the establishment of CBCT's. In the introduction to the amendments, the Comptroller stated that they were based upon the holding in *Smith* that a CBCT owned or rented by a national bank is subject to the branching restrictions of the McFadden Act. 41 Fed.

Reg. 48,333 (Nov. 3, 1976). But, equally important, the introduction also stated that these restrictions did not apply to CBCT's that banks do not "own or rent," and have thus not "established." *Id.* Thereafter, the Comptroller's staff issued a series of interpretive letters along similar lines. Finally, in July 1981, the Comptroller published a proposed regulation formally incorporating his 1976 interpretation that an ATM is not a branch of a national bank unless the bank owns or rents its. 46 Fed. Reg. 38,925 (July 30, 1981). In July 1982, the Comptroller adopted the regulation (the Regulation). It provides in relevant part:

> A "CBCT branch" is an automated device, *established (i.e., owned or rented) by a national bank* at a location separate from the main office or a domestic branch, that:
>
> 1. Takes deposits, or
> 2. Disburses cash drawn against:
>
> (i) A customer's deposit account, or
>
> (ii) A customer's pre-approved loan account.

12 C.F.R. § 5.31(b) (1984) (emphasis supplied). Defendant Marine entered into the agreement with Wegmans not long after the Regulation was adopted, obviously on the assumption that by sharing the use of an ATM owned and operated by Wegmans, Marine would not "establish" a "branch" in Canandaigua.

III. Marine's appeal

With this background in mind, we turn to the issues raised by defendant Marine's appeal. It is clear that whether a particular facility is a branch established and

operated by a national bank under the McFadden Act is a question of federal law, that home office protection is one of New York State's restrictions as to location incorporated by reference in the McFadden Act, that plaintiff Canandaigua National Bank enjoys such protection and that Marine is therefore barred from establishing and operating a branch in Canandaigua. Thus, the key issue is whether the shared ATM in the Wegmans store in Canandaigua is a branch established and operated by Marine.

Marine argues that an electronic connection to a machine that is owned and operated by a supermarket and shared by numerous other financial institutions is not what Congress meant by "establishment" of a "branch." Marine alleges that its customers' use of Wegmans' ATM is not significantly different from their use of Wegmans' manual check cashing services, or banking by mail or telephone. Plaintiffs Banking Association and Canandaigua National Bank argue that use of Wegmans' ATM by Marine customers is a kind of electronic branch banking that falls squarely within the McFadden Act's definition of a branch, since Wegmans' ATM functions for Marine's account holders as a "place of business . . . at which deposits are received [and] checks paid." 12 U.S.C. § 36(f), *see supra* note 1. Both Marine and plaintiffs find support in the decision in *Smith*. Plaintiffs say that the District of Columbia Circuit used a functional analysis to determine the nature of a branch, and that the same method compels the conclusion here that Wegmans' ATM is a Marine branch. Marine claims that the Comptroller's Regulation used the precise language of *Smith* in exempting from the definition of "branch" an ATM not "owned or rented" by a national bank. Plaintiffs respond by characterizing this phrase as merely a "three-word parenthetical comment"; Marine

answers that the "owned or rented" standard was central to the holding in *Smith* and was intended to provide a bright line test.

Resoution of these issues is not simple. The question before us is one of statutory construction. Therefore, we start with the language of 12 U.S.C. § 36(c) and (f) to divine the meaning of the phrase "establish and operate" a "branch." The parties argue that the plain meaning of these terms requires a particular result, but such arguments, by focusing on different phrases in the relevant sections, seem to balance each other off. As indicated, plaintiffs say that the Wegmans ATM is a place at which deposits are received and checks paid for Marine account holders, within the meaning of subsection (f). But it is pointed out in response that, in the words of subsection (c), Marine did not "establish" and does not "operate" the ATM in Canandaigua; Wegmans did, and does. We do not believe that the issue can be resolved for either side so simply. The meaning of the phrase "establish and operate" is affected by the ambiguity of the definition of its object, "branch." More fundamentally, Congress in 1927 could not possibly have foreseen the current revolution in banking practices. The McFadden Act pre-dated the invention of computers as well as their application to banking through electronic funds transfer systems. Banking is no longer confined to physical transactions. A rigid application of the language of 1927 to the new technology fails to confront the economic realities facing a court, and leads to anomalous results.

We see no way neatly to categorize all of the various modern ways of accomplishing banking transactions so that it will be clear (or logically distinct) which ones constitute branch banking within the meaning of 12

U.S.C. § 36(f) and which ones do not. If Wegmans' supermarket cashes a check and at the same time telephones the bank to guard against insufficiency of funds in the customers account, apparently there is no branch; if the same functions are instantly performed by an automated teller, plaintiffs claim that there is a branch. Furthermore, the ATM networks at issue here are not even the cutting edge of the new technology. The wave of the future includes point-of-sale terminal systems (POS) and home computer banking. In the use of POS's, funds are electronically transferred directly from the customer's account to the retailer's account without the use of cash or checks. N. Penney & D. Baker, *supra*, ¶ 7.01 at 7-2. It would defy common sense to consider a personal computer a branch, yet home banking by computer is already available and may soon offer some of the functions performed by Wegmans' ATM, including those arguably covered by the definition in Section 36(f). The technology for such systems already exists. Frieder, Legislating for Interstate Bank Expansion: Financial Deregulation and Public Policy, 9 J. Corp. L. 673, 739, (1984).

Since the language of the statute is not determinative, we turn to two alternate sources of guidance—first, legislative intent at the time the McFadden Act was passed, *Cass* v. *United States*, 417 U.S. 72, 77-79 (1974), and second, the views of the executive agency charged with the Act's enforcement. As to the former, it is clear that the governing principle behind the McFadden Act was to strengthen national banks and achieve approximate competitive equality between the state and national banking systems. In the words of Representative McFadden, the Act's major sponsor,

> As a result of the passage of this act . . . the national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal reserve system.

68 Cong. Rec. 5815 (1927). Indeed, the parties before us agree that the Act sought to insure rough competitive equality between state and national banks. They disagree, however, about the impact on this objective of defining a shared ATM system as a branch.

Plaintiffs insist that failure to characterize the Wegmans-Marine arrangement as a branch gives national banks a significant competitive advantage over state banks, since the latter are barred by the New York Banking Law from using ATM's in home office protected communities. An amendment to New York Banking Law, Section 105-a, was passed after the opinion below was issued, and became effective on October 8, 1984. It authorizes banks to conduct banking at ATM's, point-of-sale terminals and "similar facilities," and states generally that "[s]uch facilities shall not be deemed to be branches," but with the proviso that in home office protected communities they "shall be deemed to be branches." [3]

[3] Section 105-a, as amended, provides:

> A bank or trust company, pursuant to resolution duly adopted by a majority of its board of directors, may conduct a banking business, at automated teller machines, point-of-sale terminals, and similar facilities subject to regulations which may be promulgated by the banking board. Such facilities shall not be deemed to be branches and shall not be subject to any of the provisions of this chapter applicable to branches; provided however that *notwithstanding the foregoing, for purposes of clause (ii) of subdivision one of section one hundred five of this chapter, such facilities shall be deemed to be branches,* and such facilities shall be subject to the terms and conditions of section one hundred five, and for purposes of section twenty-eight-b of this chapter, such facilities shall be deemed to be branches. (emphasis supplied)

On the other hand, Marine argues that if we affirm the district court's ruling that the ATM at Wegmans is a Marine branch, state banks will gain a competitive advantage. Marine claims that New York State banks are authorized to use ATM's in any state in the nation that permits their use; national banks, however, will be barred from offering ATM access across state lines, since the McFadden Act allows the establishment of branches only "within the State in which said association is situated." 12 U.S.C. § 36(c)(2). Some state-chartered members of plaintiff Bankers Association, for example, would thus be insulated from competition in their home communities, yet might be free to offer ATM services in other states without competition from national banks. This could be a considerable marketing advantage, not merely a theoretical one, since numerous states have issued rulings or passed legislation permitting ATM usage, in some instances excluding it from the usual limitations on branch banking.[4] Thus, it appears that if shared ATM usage is deemed the "establishment" of a "branch" for purposes of federal law, national banks will be prohibited from the interstate activities facilitated by such laws, for the reasons given above. This will limit the ability of national banks to compete in the use of major technological developments in this industry, contrary to Congressional purpose.

We would feel uneasy, however, resting our decision primarily on a determination of economic impact that we are ill-equipped to assess. Accordingly, we turn to the

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[4] Of the approximately 40 states that have enacted special legislation authorizing state-chartered institutions to use electronic terminals, more than 20, including New York, consider them not to be "branches.' Like New York, however, some of these states do impose geographic restrictions on the deployment of the terminals. N. Penney & D. Baker, *supra*, ¶ 22.01[2] at 22-12 to 22-14, n.44 (1980 & 1983 Cum. Supp.).

interpretation of the McFadden Act by the administrative agency charged with its enforcement. Ordinarily, the agency's view would be entitled to "considerable respect," *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); and we believe that this is particularly appropriate here. Fashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies. *American Trucking Ass'ns.* v. *United States*, 344 U.S. 298, 309-310 (1953). The Comptroller has determined that an ATM that is not "owned or rented" by a national bank is not a branch under Sections 36(c) and (f) of the Act. We think that considerable deference should be accorded to this view. *Securities Industry Ass'n* v. *Bd. of Gov. Fed. Reserve System*, 104 S.Ct. 3003, 3009 (1984). *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778, 2781-82 (1984). This construction need not be the only permissible one, nor the one that we necessarily would have adopted in an initial review. *Chevron, supra*, 104 S.Ct. at 2782 n.11; *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). But absent compelling evidence that the agency's regulation is erroneous, arbitrary, or clearly unsupported by the statute, judicial deference is appropriate. *CBS* v. *FCC*, 453 U.S. 367, 390 (1981). Here, as best we can tell, the agency's interpretation in fact appears to promote the purposes of the McFadden Act.

Courts should be particularly cautious where the regulated parties have relied on the agency's ruling and would be harmed by a reversal. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-58 (1978). Marine and numerous amici inform us of the substantial growth of shared ATM networks in the past decade, see ATM's 1984 Worldwide: The Nilson Report Annual Survey of

Automated Teller Machines and Debit Cards (3d ed. 1984), and the reliance by national banks and other parties on the Comptroller's post-*Smith* rulings. Congress has passed several pieces of banking legislation since 1976 when *Smith* was decided, but has not overruled the Comptroller's contemporaneous interpretation of that decision. Nor has Congress moved to further define the permissible scope of national bank participation in electronic funds transfer systems, despite numerous suggestions that it do so. See Geographic Restrictions on Commercial Banking in the U.S., The Report of the President 17-20 (1981).[5] Such inaction lends further weight to our inclination to defer to the Comptroller's view. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 (1981).

It is true that the Regulation uses a distinction that is perhaps arbitrary, even if it does track the language of *Smith*. Whether an ATM is "owned" or "rented" or simply "used" by a bank may be more a matter of how agreements are structured than a reliable determinant of whether or not the ATM constitutes a "branch." On the other hand, the differences between a Wegmans machine and a Marine branch office are significant. Marine determines where a branch office will be located in light of its own judgment concerning banking needs; Marine owns or rents the facility and maintains it; Marine controls customer access and publicly identifies the facility

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[5] The final Report of the National Commission on Electronic Fund Transfers, a commission established by Congress in 1974, recommended "*that the rules governing the deployment of off-premise EFT terminals should be separate and distinct from and less restrictive than the rules regarding the establishment of conventional branches.* (Unanimous voice vote in favor)." EFT in the United States, Policy Recommendations and the Public Interest 78 (1977). (emphasis in original)

as its own. With Wegmans' ATM, however, Wegmans decided to install it to attract customers for its store; Wegmans owns the machine and maintains it; Wegmans apparently decides whether to allow customers of different banks to use it; and customers do not view the machine as belonging to Marine. Moreover, the *Smith* court's use of the "owned or rented" phraseology seems to have been more than an off-handed parenthetical, as alleged by plaintiffs. The phrase is used not just once in the *Smith* opinion, but twice. See 534 F.2d at 941, 951. In addition, the *Smith* court apparently recognized, 534 F.2d at 941, 946-47 n.98, that without the requirement that a facility be "established (i.e., owned or rented)," the definition of "branch" would be broad enough to include almost any means of communicating instructions to a bank and in theory could bar such accepted conveniences as banking by mail and banking by telephone. Finally, definitions that draw a line between what is permitted and what is not are frequently arbitrary, but lines still must be drawn and this one has the advantage of being a bright one. For these reasons, the Comptroller's definition of "branch" in the 1982 Regulation is a reasonable construction of the McFadden Act.

In sum, the precise language in the *Smith* opinion, the Comptroller's consistent rulings since 1976 culminating in the Regulation, and the obviously substantial, although relatively recent, reliance of the industry on the language in *Smith* and on the Comptroller's rulings and Regulation all suggest that the district court's interpretation of the McFadden Act here was incorrect. We agree with the court's observation that "a perfect solution may not be within the power of the judiciary and may better be left to the legislative branch. . . ." 583 F. Supp. at 1044. But the consequences of legislative in-

action, it seems to us, work against plaintiffs who are swimming against the current of technological development. We are told that the electronic facilities now mushrooming all over the country will furnish the consumer with greater convenience in banking at lower cost, and that these new methods are necessary for our country's future commercial development. We do not know whether this is so. Certainly, whether these new payment systems are desirable is not a decision for a court to make. It does seem, however, that there is a significant consumer demand inviting banks to move in that direction. Given the technological promise of interstate electronic banking and the substantial steps already taken toward achieving it, if the momentum already developed should be stopped, it should be done by Congress, and not by this court, particularly when the barrier we are asked to impose would be based upon definitions framed over 50 years ago.

Should Congress find itself in disagreement with the Comptroller's Regulation, which we accept as a legitimate interpretation of the governing statute, a legislative solution is available. Pending such an update of the 1927 Act, we hold that a national bank's usage of a shared ATM, which it does not own or rent, does not constitute the establishment and operation of a branch under sections 36(c) and (f) of the McFadden Act.

Plaintiffs also contend, however, and the district court agreed, that Marine has established a branch in Canandaigua even under the Comptroller's Regulation on the theory that the transaction fees Marine paid to Wegmans for each use of the ATM by Marine customers constitute "rent." We do not agree that this is "rent" in any colloquial or legal sense of the word. The fees do not

grant Marine, or the other participating financial institutions, any proprietary or leasehold interest in the machine —even on a temporary basis. The transaction fee is more akin to the charge incurred for a phone call. It is a per unit cost for electronic access, by multiple parties, to equipment owned and operated by another party.

The Comptroller made a similar determination in a 1981 interpretive letter, which states that:

> a national bank which makes regular use of a facility but has no property interest in the facility has not established a branch. Thus, banks only paying a transaction fee for the use of a facility need not file branch applications; the use of the facility is analogous to the use of a mail box or post office. . . .

Comptroller Staff Interpretive Letter No. 188 (May 12, 1981), [1981-82 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,269. This view, which was codified in the Comptroller's Regulation, 12 C.F.R. § 5.31(g)(4), appears to be eminently sensible. Plaintiffs argue, in effect, that all of the financial institutions that join shared ATM networks are simultaneously renting all of the ATM's electronically connected to those networks. This makes the word "rent" so broad as to be meaningless.

Accordingly, we conclude that Marine's use of the Wegmans shared ATM, which Marine neither owns nor rents, does not constitute the establishment and operation of a branch under the McFadden Act.

IV. Plaintiffs' cross-appeal

Plaintiffs cross-appeal from the ruling of the district court that Wegmans' provision and maintenance of the Canandaigua ATM does not violate New York Banking

Law Section 131.1. That statute provides that only a bank may

> employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiving deposits, making discounts, receiving for transmission or transmitting money in any manner whatsoever, ...

In their pendent claim, plaintiffs alleged that Wegmans is conducting a banking business without the requisite state authorization, and should be enjoined from doing so.

Wegman's initial response to plaintiffs' complaint was a motion to dismiss the pendent claim for want of federal jurisdiction. The district court rejected this challenge and held that the claim satisfied the two-part test of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), for proper exercise of federal court jurisdiction over a pendent state claim. 575 F. Supp. at 1427-30. The criteria set forth in *Gibbs* are whether the federal court has the power to decide the state law question, and, if so, whether the court, in its discretion, deems it appropriate to exercise that power in the particular case. *Gibbs*, *supra*, 383 U.S. at 725-27; *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 809 (2d Cir. 1971).

On the first issue, the district court concluded that the operation of the ATM in Wegmans' store in Canandaigua is the "common nucleus of operative fact," *Gibbs*, *supra*, 383 U.S. at 725, that forms the basis of both the federal and state claims. Under these circumstances, the court found pendent party jurisdiction despite the absence of an independent basis of federal jurisdiction over Wegmans. *Leather's Best*, *supra*, 451 F.2d at 809-10; *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F.2d 627, 629-30 (2d Cir. 1971). The district court then de-

cided, in its discretion, that the interests of judicial economy and convenience, as well as fairness to litigants, would be served if the entire case were "heard in an expeditious manner in one forum." 575 F. Supp. at 1430.

Shortly thereafter, plaintiffs and Marine both moved for summary judgment. Wegmans did not so move, but in April 1984, the district court granted summary judgment for plaintiffs on the federal claim and for Wegmans on the state law claim. The court found plaintiffs' pendent claim to be "tenuous," particularly in view of plaintiffs' inability

> to present any New York caselaw which even remotely suggests that Wegman's activities constitute 'banking' under Section 131.1. This alone could be construed as supporting the legality of Wegman's activities, and is accented by the fact (pointed out by Wegman's) that these machines have been in operation for over ten (10) years.

583 F. Supp. at 1049. The court went on to hold that

> At most, Wegman's is acting as an agent for a bank, and not as a banking institution itself. Thus, the policy behind Section 131.1, to confine banking functions to government chartered, regulated and inspected institutions . . . is in no way abrogated by Wegman's ownership and maintenance of the ATM machine in the Canandaigua store, for it remains the chartered, regulated and inspected banks that are doing the banking—not Wegman's.

Id.

We agree that the district court had power to exercise pendent party jurisdiction over the state claim. *Leather's Best, supra; Astor-Honor, supra.* We question, however, the wisdom of adjudicating this important state

law question in federal court apparently before any New York State court has passed on it. *Gibbs* expressly warned that

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

383 U.S. at 726. The propriety of non-bank ownership of ATM's falls squarely within the province of the New York state regulatory scheme for licensing banks. We think this is precisely the type of novel and unsettled state law question that deserves a "surer-footed" state court adjudication. *Gregory* v. *Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981). Our holding here that Marine's activities are not branch banking under federal law lends even greater significance to the state law question and to the interests of New York State in defining the scope of its regulatory scheme.

Courts of appeals rarely reverse a discretionary district court exercise of pendent jurisdiction, *Kavit* v. *A.L. Stamm & Co.*, 491 F.2d 1176, 1180 n.5 (2d Cir. 1974), but we believe that the circumstances of this case are unusual enough to justify that course. The factors to be weighed in the district court's discretionary decision are judicial economy and convenience, fairness to the parties and the degree of uncertainty in the relevant state law. *Financial General Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 776 (D.C. Cir. 1982). Where the last factor clearly outweighs the others, and where potential harm to the litigants is either minimal or easily mitigated, appellate reversal of a district court may be appropriate. *Financial General Bankshares, supra*, 680 F.2d at 777-78; *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336,

339 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982). In *Financial General Bankshares*, the District of Columbia Circuit held that the district court had abused its discretion in holding a 3-day trial on novel and unsettled state law questions after dismissal of the federal claims. The pendent claims there, as here, involved state law regulatory questions that had never been addressed by the state courts. 680 F.2d at 777. In this case, which was decided without trial on motions for summary judgment, we have even less concern about judicial economy. Plaintiffs can refile their state law complaint in state court, using the same documents submitted in support of their papers below. *Financial General Bankshares, supra*, 680 F.2d at 778.

We conclude, therefore, that the application of New York Banking Law to Wegmans' provision and maintenance of an ATM should be left to the courts of the state. Accordingly, the judgment below for Wegmans on the pendent claim is vacated, and the district court is instructed to dismiss that claim without prejudice.

APPENDIX C

Decision of United States District Court for the Western District of New York

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INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC. and The Canandaigua National Bank and Trust Company,

Plaintiffs,

vs.

MARINE MIDLAND BANK, N.A. and Wegman's Food Markets, Inc.,

Defendants.

No. CIV-83-1006T.

United States District Court,
W.D. New York.

April 6, 1984.

Bankers' association sued bank for alleged violations of McFadden Act and of New York statute. The District Court, Telesca, J., held that: (1) fact that it was supermarket that owned automated teller machine rather than bank did not preclude finding of "branch banking" within meaning of the National Bank Act; (2) New York state law prohibited branching in city of Canandaigua, and for such reason the McFadden Act prohibited utilization of supermarket's automated teller machine in that city; and (3) where supermarket chain owned

automated teller machine, supermarket was acting as agent for bank, and not as banking institution itself, and thus policy behind New York banking statute, to confine banking functions to government chartered, regulated and inspected institutions, was in no way abrogated by supermarket's ownership and maintenance of the machine in its store.

Summary judgment granted to plaintiffs as against defendant bank, and summary judgment granted to supermarket.

1. **Statutes ⇐219(3)**

Where agency has not taken longstanding and consistent position in interpreting statute it is empowered to apply, court need not and should not give substantial weight to its most recent interpretation. National Bank Act, 12 U.S.C.A. §§36, 36(f).

2. **Banks and Banking ⇐236**

That it was supermarket that owned automated teller machine rather than bank did not preclude finding of "branch banking" within meaning of the National Bank Act. National Bank Act, 12 U.S.C.A. §36(f).

See publication Words and Phrases for other judicial constructions and definitions.

3. **Banks and Banking ⇐236**

Ultimate purpose of McFadden Act was to prevent just such competitive advantages as allowing bank to provide service to customers of depositing money at place away from bank's main office. National Bank Act, 12 U.S.C.A. §36(f).

4. Banks and Banking ⇐236

Limited incorporation of state law into McFadden Act was not designed to insure perfect equality between branches of state and national banks. National Bank Act, 12 U.S.C.A. §36.

5. Constitutional Law ⇐70.1(7)

If New York's "branch banking" definition was more narrow than that provided in McFadden Act, and if same placed federal banks at competitive disadvantage in New York, relief could be granted only through legislative process. National Bank Act, 12 U.S.C.A. §36(c, f).

6. Banks and Banking ⇐236

New York state law prohibited branching in city of Canandaigua, and for such reason the McFadden Act prohibited utilization of supermarket's automated teller machine in that city. N.Y. McKinney's Banking Law §§105, 131, subd. 1; National Bank Act, 12 U.S.C.A. §36(c).

7. Banks and Banking ⇐236

Where supermarket chain owned automated teller machine, supermarket was acting as agent for bank, and not as banking institution itself, and thus policy behind New York banking statute, to confine banking functions to government chartered, regulated and inspected institutions, was in no way abrogated by supermarket's ownership and maintenance of the machine in its store. N.Y. McKinney's Banking Law §131, subd. 1; National Bank Act, 12 U.S.C.A. §36(c).

Appendix C—Decision of United States District Court, for the Western District of New York.

Greisberger, Zicari, McConville, Cooman & Morin, P.C., Rochester, N.Y., for plaintiffs; Kevin S. Cooman, Rochester, N.Y., of counsel.

Phillips, Lytle, Hitchock, Blaine & Huber, Buffalo, N.Y., for defendant Marine Midland; Paul Stecker, Buffalo, N.Y., of counsel.

Nixon, Hargrave, Devans & Doyle, and Paul S. Speranza, Jr., Rochester, N.Y., for defendant Wegman's Food Markets, Inc.; Michael R. Wolford, Rochester, N.Y., of counsel.

MEMORANDUM DECISION and ORDER

TELESCA, District Judge.

This Court is faced with the dilemma of interpreting the legislative intent of a 1927 federal banking statute in an effort to determine if the "computer banking" at issue in this case would have been considered "branch banking" by the Congress when it passed the McFadden Act more than 50 years ago. As a part of this endeavor, separate State and Federal statutory schemes must be blended together with the hopeful and improbable result that such joint construction will lead to "competitive equality" between banking institutions of both sovereigns. Recognizing from the outset that a perfect solution may not be within the power of the judiciary and may better be left to the legislative branch, and based upon the reasons set forth below, I hold that defendant Marine Midland Bank's activities violate the McFadden Act and must be enjoined.

Appendix C—Decision of United States District Court, for the Western District of New York.

PROCEDURAL BACKGROUND

Plaintiffs, the Independent Bankers Association of New York State, Inc. (IBA-NYS), a non-profit corporation consisting of some 96 member banking institutions, and the Canandaigua National Bank and Trust Company, a federally chartered banking association and a member of IBA-NYS with its home office located in the City of Canandaigua, have brought this action seeking declaratory and injunctive relief against Marine Midland Bank, N.A. (Marine) a federally chartered banking association and Wegman's Food Markets, Inc. (Wegman's), a supermarket chain with numerous outlets including one located in the City of Canandaigua, New York. The complaint alleges that the automated teller machine (ATM) located at the Wegman's Canandaigua store and its utilization by Marine constitutes branch banking in violation of the McFadden Act, 12 U.S.C. Section 36(c) and illegal banking by Wegman's, in violation of New York Banking Law Section 131.1

In lieu of answering the complaint, Wegman's moved to dismiss the pendant state claim alleged against it on the ground that subject matter jurisdiction was lacking. This Court denied Wegman's motion and held that a District Court does, under proper circumstances, possess so-called "pendant party" jurisdiction under Article III of the Constitution, and that the facts alleged in the complaint provided a sufficient context to exercise such jurisdiction. *Independent Bankers Association of New York State, et al. v. Marine Midland Bank, et al.*, 575 F.Supp. 1425 (W.D.N.Y. 1983).

Plaintiffs now move for summary judgment on both the federal and state claims, and Marine has cross-moved for summary judgment.

FACTS

All parties concede that the relevant facts are not in dispute. In the summer of 1983 Wegman's installed an ATM in its Canandaigua, New York supermarket.[1] Shortly thereafter, Wegman's entered into a contract with Marine to tie the Canandaigua Wegman's ATM into the HarMoney computer network. Customers of a HarMoney member financial institution (of which Marine is one) may, by placing an identification card issued by a member bank into the ATM, make contact with their bank for the purpose of making deposits, withdrawals, balance inquiries or obtaining a cash advance on a credit card account.

Under this arrangement, Wegman's retains ownership of the ATM and is responsible for loading the machine with cash, and issuing the receipts. Wegman's has no access to the secured container in which deposits are automatically placed and is not responsible for any discrepancies between the amount displayed on the transaction slip and the amount actually deposited. Marine itself is responsible for emptying the deposit container each day. When a customer uses the ATM for a withdrawal, (or a cash advance from a credit card account) the ATM dispenses cash provided by Wegman's, but only after electronic approval has been

[1] Canandaigua is a small city located at the northern end of a Finger Lake by the same name, and has a population of approximately 11,000.

received (through the computer network) from Marine. Accordingly, the ATM and its owner Wegman's will not dispense funds to a customer in excess of the amount in his Marine bank account.

Once the transaction is approved by Marine (which occurs while the customer waits), the customer's account is debited and Wegman's account is credited in the identical amount. Wegman's account is also credited at that time with a transaction fee paid by Marine for each transaction made by one of its customers through the Wegman's ATM.

It is against this factual background that the statutory framework must be imposed.

DISCUSSION

THE CLAIM AGAINST MARINE

I.

In the early 1920's this country experienced increasing tension between banks chartered by the federal government and those chartered by the states. Much of this tension was caused by the proliferation of bank branching at that time by state banking institutions. The concern was that state banks were being granted a competitive advantage under state banking laws to the detriment of the federal banks. In response to this concern, the McFadden Act, 12 U.S.C. Section 36, was enacted. In the words of its sponsor, Representative McFadden:

> As a result of the passage of this act, the National Bank Act has been so amended that national banks are able to meet the needs of modern industry and

> commerce and competitive equality has been established among all member banks of the Federal Reserve System.

68 Cong.Rec. 5815 (1927).

In *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966) ("*Walker Bank*") the Supreme Court exhaustively explored the legislative history of the McFadden Act and concluded: "It appears clear from this resume of the legislative history of Section 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned". *Id.* at 261, 87 S.Ct. at 497. The Act supports this policy by "permit[ting] national banks to establish branches if such branches could be established under state law". *Id.*

The definition of a "branch" under the McFadden Act is provided in Section 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Although this statutory definition was enacted in 1927, it was not until 1969 that the Supreme Court determined in *First National Bank of Plant City, Florida v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969) ("*Plant City*") that federal law controlled its interpretation. *Id.* at 134, 90 S.Ct. at 343.

At issue in *Plant City*, was a bank which utilized an armored car with a customer window installed on one side to provide services to customers in stated locations at stated times. The armored car would roll up to a place of business where employees could then make deposits and withdrawals from their bank accounts, although by prearranged agreement, the deposits and withdrawals would not be considered effective until the transactions were actually processed back at the bank's main facility. In response to the bank's argument that the armored car did not constitute a branch within section 36(f) the Court held:

> The definition of "branch" in Section 36(f) must not be given a restrictive meaning which [would] frustrate the congressional intent "of advancing competitive equality" this Court found to be plain in *Walker Bank, supra*. . . . However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

Plant City, supra, 396 U.S. at 134-135, 90 S.Ct. at 343-344.

The Court went on to conclude:

> Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider, not merely the contractual rights and liabilities created by the transactions, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably, a competitive

> advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later. *Id.* at 136-137, 90 S.Ct. at 345.

The influx of computer terminals into the banking field in the early 1970's prompted the Comptroller of the currency to issue regulations purportedly exempting these terminals from the definition of "branch banking" in the McFadden Act. See 12 CFR Section 7.7491 (1975). In *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.1976) ("*Smith*") the court held that customer bank communications terminals (CBCT's) owned by a national bank which accepted deposits and disbursed funds, fall within the definition of "branch banking" found in Section 36(f). Numerous other circuit courts have subsequently reached the same conclusion. *See State of Illinois v. Continental Illinois National Bank and Trust Company of Chicago*, 536 F.2d 176 (7th Cir.1976); *State of Colorado, ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497 (10th Cir.1976), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1102, 51 L.Ed.2d 537 (1976); *State of Missouri, ex rel. Kostman v. First National Bank in St. Louis*, 538 F.2d 219 (8th Cir.1976), *cert. denied*, 429 U.S. 941, 97 S.Ct. 357, 50 L.Ed.2d 310 (1976).

II.

Defendant Marine now seeks to carve an exception out of the holding of *Smith* and the other circuit court decisions, by arguing that Wegman's *ownership of the ATM* at issue distinguishes this case from *Smith* and its progeny. In support of this position, Marine points to the latest regulation of the Comptroller now excluding CBCT's *which are not owned or rented* by a national bank, from the definition of "branch" found in Section 36(f). 12 C.F.R. Section 5.31(b). Marine argues that due deference should be given to the expertise of the Comptroller in this area and his expert opinion should not be rejected unless it is clearly arbitrary and capricious.

Marine also argues that this position is supported by Section 36(c) of the Act itself which limits the Act's application to branches "established and operated" by a bank and further, by a phrase in the *Smith* decision which stated that "any facility that performs the traditional bank functions of receiving or disbursing funds is a 'branch' of a national bank within the meaning of Section 36(f) if (1) the facility is established (*i.e., owned or rented*) by the national bank, *and* (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks . . .". *Smith, supra*, 534 F.2d at 951 (emphasis added). Marine contends that this phrase implies that a CBCT *not owned or rented* by a national bank, such as the Wegman's ATM, is *not a branch* within the definition of Section 36(f).

Finally, Marine argues that the competitive equality intended to be fostered by the McFadden Act would be disrupted by a ruling that Marine cannot utilize the Wegman's ATM machine because state banks would continue to do so, at least to a limited extent, thereby placing Marine at a decided competitive disadvantage. These arguments will be dealt with seriatim.

A.

[1] Initially, Marine's argument that this Court should defer to the expertise of the Comptroller of the currency in his construction of Section 36(f) is somewhat less than compelling. If the Supreme Court had acceded to this view, both *Plant City* and *Walker Bank* would have yielded different results, for in both cases the Comptroller's construction of this very section was expressly rejected. More recently, when the Comptroller was of the opinion that all CBCT's were not branches, the District of Columbia Circuit Court of Appeals again rejected the Comptroller's construction of the statute. *See Smith, supra.* Now, after the Comptroller has retreated to his present position (*i.e.*, that a CBCT is not a branch, if it is not owned or rented by a national bank), Marine argues that this Court should blindly accept that view. I disagree. Where an agency has not taken a long-standing and consistent position in interpreting a statute it is empowered to apply (which is clearly the case here), this Court need not, and should not give substantial weight to its most recent interpretation. *Cf. United States of America v. University Hospital of New York at Stony Brook (Baby Jane Doe)*, 729 F.2d 144, at 154 (2nd Cir.1984); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1329-1331 (11th Cir.1983).

B.

[2] Marine's second argument that the holding in *Smith* is inapplicable to the present situation because here it is Wegman's that owns the machine rather than the Bank, presents the proverbial distinction without a difference. Marine's customers using the Wegman's ATM can withdraw or deposit money in their Marine Midland bank account, or receive a cash advance (*i.e.* a loan) from a Marine Midland credit card account with the same force and effect as if they appeared personally at a Marine Midland "brick and mortar" branch and made the same transactions. Wegman's, its ATM and the HarMoney system only provide a vehicle for the bank and its customers to do business. The argument that Wegman's and the HarMoney network should somehow insulate Marine's activities through the Wegman's ATM and place it outside of the definition of "branch banking" in Section 36(f) is substantially similar to the bank's argument in *Plant City*. There the bank attempted (by contract) to make deposits and withdrawals accomplished at the armored car facility valid only after being processed at the main bank branch. This "form over substance" argument was expressly rejected by the Supreme Court.

More importantly, the Supreme Court in *Plant City* specifically held that the definition of "branch" found in Section 36(f) had a "calculated indefiniteness" and that the definition must be read broadly to promote the overall policy behind the Act. "Penetrating the form . . . to the underlying substance of the transactions", this Court is satisfied, as was the Supreme Court in *Plant*

City, that when a customer deposits money in a Marine Midland account through the Wegman's ATM, that "the bank has, for all purposes contemplated by Congress in Section 36(f), received a deposit". *Plant City, supra*, 396 U.S. at 137, 90 S.Ct. at 345. This is sufficient to constitute "branch banking" within the meaning of Section 36(f).

[3] Moreover, it is undeniable that the utilization of Wegman's ATM in Canandaigua grants a competitive advantage to Marine by allowing the bank to provide the service to customers of depositing money at a place away from the bank's main office. *See Plant City, supra*, 396 U.S. at 138, 90 S.Ct. at 345. As the ultimate purpose of the McFadden Act was to prevent just such advantages, Marine's owned or rented limitation must fail.[2]

C.

Marine's final argument in support of its position that the Wegman's ATM is not a branch, is that any holding to the contrary would actually disrupt the competitive equality intended to be fostered by the Act. In support of its position Marine submits an opinion of the New York State Banking Department which indicates that a

[2] Notwithstanding the above analysis, and for the moment assuming that Marine's (and the Comptroller's) interpretation of the *Smith* decision is correct, Marine's argument remains flawed. It is uncontroverted that Marine pays a fee per transaction for the use of the Wegman's ATM machine. Even under the Comptroller's strained interpretation of the statute, (that a computer terminal must be owned or rented by a bank before such terminal will be considered a "branch") it is without question that Marine does pay "rent" of sorts. Thus, under any interpretation of the Act, Wegman's ATM does constitute a "branch" of Marine within the meaning of 12 U.S.C. Section 36(f).

state bank may utilize an ATM and allow customers to make withdrawals from bank accounts and credit card accounts, as well as balance inquiries without running afoul of New York's branch banking restrictions. Because a facility which permits a customer to make a withdrawal from a bank account must be considered a branch under the analysis set forth in *Plant City*, the federal bank may in fact be prohibited from fairly competing with a state bank whose customers can utilize an ATM to make withdrawals. Assuming *arguendo* that this opinion construing state law is correct, an assumption vigorously rebutted by plaintiffs,[3] it is this Court's view that Congress, and not the judiciary, must provide the remedy.

[4] As the Court noted in *Smith*, the limited incorporation of state law into the McFadden Act was not "designed to insure perfect equality between the branches of state and national banks". 534 F.2d at 949. The *Smith* court went on to hold that even if a state were to exclude CBCT's from its own definition of a

[3] Plaintiffs argue that New York Banking Law Section 105-a.3 allows the utilization of an ATM by an outside bank in a protected area like Canandaigua *only* to "verify or guarantee checks . . . or to verify account balances". As neither of these functions would fall within the definition of "branch banking" in the McFadden Act, plaintiffs argue that Marine could utilize the ATM to the same extent any state bank could. Plaintiffs contend that the New York Banking Department opinion is incorrect and of no force or effect.

"branch", the McFadden Act would still prohibit the utilization of a CBCT by a federal bank where state "branching" was not permitted. *Id.* at 948.[4]

[5] Put simply, courts are constrained to read statutes as they are written, and not as with hindsight we would like them to have been written. If New York's "branch banking" definition is indeed more narrow than that provided in Section 36(f) of the McFadden Act, and this places federal banks at a competitive disadvantage in New York, relief can only be granted through the legislative process.

In summary, I hold that Marine's utilization of the Wegman's ATM to allow customers to make deposits and withdrawals from Marine Midland bank accounts constitutes a "branch" within the meaning of 12 U.S.C. Section 36(f).

III.

[6] The next step in regard to plaintiffs' claim against Marine is to determine whether state law prohibits bank branching in Canandaigua. New York Banking Law Section 105, the applicable statute, prohibits branching

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[4] Plaintiffs contend in their reply brief that such a situation need not place national banks at a disadvantage citing *State Bank of Fargo v. Merchants National Bank and Trust Company of Fargo, supra*, 593 F.2d at 345-346, in support of the proposition that under the McFadden Act, national banks may be permitted to utilize ATM's to the same extent state banks are permitted to use them under state law. However, this holding was unique to that case for North Dakota law defined "branch banking" by reference to the McFadden Act. New York Banking Law Section 105 does not have this feature, and thus, plaintiffs' "equality solution" is impermissible under the facts and law involved herein.

of state banks in a city with a population of 50,000 or less in which the principal office of another bank, trust company or national banking association is already located. Defendants freely admit that plaintiff Canandaigua National Bank has its principal place of business in Canandaigua, and that the City of Canandaigua has a population of less than 50,000. Thus, the unavoidable conclusion is that state law prohibits branching in the City of Canandaigua and therefore, 12 U.S.C. Section 36(c) prohibits Marine's utilization of the Wegman's ATM machine in that City.

THE CLAIM AGAINST WEGMAN'S

Plaintiffs' state law claim against Wegman's is a bit more tenuous. Plaintiffs assert that New York Banking Law Section 131.1 prohibits Wegman's from owning and operating its ATM in Canandaigua or elsewhere.[5] Plaintiffs are unable to present any New York caselaw which even remotely suggests that Wegman's activities constitute "banking" under Section 131.1. This alone could be construed as supporting the legality of Wegman's activities, and is accented by the fact (pointed out by Wegman's) that these machines have been in operation for over ten (10) years.

[5] New York Banking Law Section 131.1 provides in pertinent part: "No corporation, domestic or foreign, other than a national bank or federal reserve bank, unless expressly authorized by the laws of this state, shall employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiving deposits, making discounts, receiving for transmission or transmitting money in any manner whatsoever. . . . No corporation . . . shall possess the power of receiving money for the transmission or of transmitting the same, by draft, traveler's check, money order or otherwise."

[7] However, of more substantial importance is this Court's previous holding that Wegman's ATM merely provides the vehicle through which a bank in the HarMoney network can transact business with the customer. At most, Wegman's is acting as an agent for a bank, and not as a banking institution itself. Thus, the policy behind Section 131.1, to confine banking functions to government chartered, regulated and inspected institutions, *see New York Credit Men's Adjustment Bureau, Inc. v. Samuel Breiter and Co., Inc.*, 253 F.2d 675, 677 (2nd Cir.1958); *Miller v. Discount Factors, Inc.*, 1 N.Y.2d 275, 279, 152 N.Y.S.2d 273, 135 N.E.2d 33 (1956), is in no way abrogated by Wegman's ownership and maintenance of the ATM machine in the Canandaigua store, for it remains the chartered, regulated and inspected banks that are doing the banking—not Wegman's.

Finally, this Court is not willing to take the quantum leap necessary to reach the conclusion advanced by plaintiffs in this case. To do so, would be to place form of ownership over substance of the transaction, the precise argument advanced previously by Marine on the federal claim and soundly rejected. For instance, does Wegman's ownership of the ATM machine at issue place it in any different position than if it had simply leased space to Marine or another banking institution for the operation of the bank's own ATM? By a literal reading of the statute, even Wegman's leasing of space for banking purposes could be considered banking under Section 131.1, a result which is clearly unintended and unnecessary. In the present case it is true Wegman's has leased not only the floor space but also part of the

computer hardware to the bank, but this does not materially change the crucial issue of which parties are actually involved in the banking process. Those parties are the same in either scenario; Marine and its customers.

With no New York authority to the contrary, I must conclude that the New York Legislature would not have intended ownership of the computer terminal to be the determining factor as to whether illegal banking was taking place. Accordingly, I hold that Wegman's activities are not in violation of Section 131.1 of the New York Banking Law, and the action is dismissed as against Wegman's.[6]

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[6] Wegman's has not moved for summary judgment. However, this Court may under appropriate circumstances enter summary judgment in favor of the non-moving party. *Cf. Morrissey v. Curran*, 423 F.2d 393 (2nd Cir.1970), *cert. denied*, 399 U.S. 928, 90 S.Ct. 2245, 26 L.Ed.2d 796 (1970); *Moss v. Ward*, 450 F.Supp. 591, 594 (W.D.N.Y.1978). The present circumstances, where no material facts appear to be in dispute, warrant such action.

Appendix C—Decision of United States District Court, for the Western District of New York.

CONCLUSION

As stated at the outset, an all encompassing solution to this issue of competitive equality among state and federal banking institutions is probably unattainable under the present statutory scheme. The application of a 50 year old statutory definition to the type of technology which could never have been dreamed of at the time the legislation was enacted is fraught with inconsistencies which are not easily reconcilable. This is equally true with respect to Section 131.1 of the New York Banking Law which was also enacted before the technology utilized in the ATM machine was developed. Recognizing these limitations, I hold that Marine's present utilization of the ATM machine in Wegman's Canandaigua store constitutes the operation of a "branch" within the meaning of 12 U.S.C. Section 36(f) and such activities are, therefore, unlawful pursuant to 12 U.S.C. Section 36(c) in conjunction with New York Banking Law Section 105. Accordingly, plaintiffs' motion for summary judgment is granted and Marine is permanently enjoined from utilizing the Canandaigua Wegman's ATM to allow its customers to make deposits or withdrawals from Marine Midland accounts or to receive cash advances from Marine Midland credit card accounts. However, I hold that Wegman's ownership and maintenance of the ATM in Canandaigua does not constitute illegal banking in violation of New York Banking Law Section 131.1 and summary judgment is entered in favor of Wegman's dismissing the complaint.

ALL OF THE ABOVE IS SO ORDERED.

APPENDIX D

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-790

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., THE CANANDIAGUA NATIONAL BANK AND TRUST COMPANY,
Applicants,

vs.

MARINE MIDLAND BANK, N.A., WEGMANS FOOD MARKETS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29, 1985.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 18th
day of April, 1985

APPENDIX E

List of Petitioner's Members

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC.

MEMBERS

Banks indicated with asterisk (*) do *not* have home office protection under New York Banking Law §105.

(# of member banks within group/# with home office protection)

GROUP I (11/9)

Bank of Akron
Alden State Bank
Evans National Bank of Angola
Bank of Castile
Bank of Cattaraugus
Bank of Holland
Cattaraugus County Bank, Little Valley
Exchange National Bank, Olean
*Pavilion State Bank
Salamanca Trust Company
*Wyoming County Bank, Warsaw

GROUP II (7/5)

Canandaigua National Bank & Trust Co.
Ontario National Bank of Clifton Springs
Dundee State Bank
*National Bank of Geneva
Lyons National Bank
*First National Bank of Rochester
Horizon Bank, N.A. Waterloo

Appendix E—List of Petitioner's Members.

GROUP III (15/15)

Community National Bank, Addison
Atlanta National Bank
Bank of Avoca
Bath National Bank
First State Bank, Canisteo
Delaware National Bank of Delhi
First National Bank of Downsville
First National Bank of Dryden
First National Bank of Groton
Steuben Trust Company, Hornell
Tompkins County Trust Co., Ithaca
Nichols National Bank
National Bank of Delaware County, Walton
Tioga State Bank, Spencer
First National Bank of Wayland

GROUP IV (12/11)

St. Lawrence National Bank, Canton
State Bank of Chittenango
First National Bank of Hermon
First National Bank, Lisbon
Herkimer County Trust Co., Little Falls
First National Bank of Norfolk
Oneida Valley National Bank, Oneida
Redwood National Bank
Solvay Bank
Cayuga Lake National Bank, Union Springs
*Bank of Utica
National Bank of Vernon

Appendix E—List of Petitioner's Members.

GROUP V (16/15)

Ballston Spa National Bank
Central National Bank, Canajoharie
National Bank of Coxsackie
Peoples Commercial Bank, East Greenbush
First National Bank of Glens Falls
Glens Falls National Bank & Trust Co.
City National Bank & Trust Co., Gloversville
Keeseville National Bank
National Union Bank of Kinderhook
Citizens National Bank, Malone
Bank of Richmondville
Adirondack Trust Co., Saratoga Springs
*Schenectady Trust Company
First National Bank of Scotia
Tupper Lake National Bank
Essex County-Champlain National Bank, Willsboro

GROUP VI (14/13)

First National Bank of Amenia
Fishkill National Bank, Beacon
United National Bank, Callicoon
Putnam County National Bank, Carmel
Ellenville National Bank
National Bank of Florida
First National Bank, Jeffersonville
Mahopac National Bank
Orange County Trust Co., Middletown
Bank of Millbrook
Peoples National Bank of Rockland County, Morsey
Union State Bank, Nanuet
First National Bank of Rhinebeck
*Hudson Valley National Bank, Yonkers

Appendix E—List of Petitioner's Members.

GROUP VII (8/8)

Bridgehampton National Bank
Bank of the Hamptons, N.A., East Hampton
Continental Bank, Garden City
First National Bank of Long Island, Glen Head
North Fork Bank and Trust Company, Mattituck
State Bank of Long Island, New Hyde Park
Peconic Bank, Riverhead
Suffolk County National Bank, Riverhead

GROUP VIII (7/0)

*New York National Bank, Bronx
*Capital National Bank of New York, N.Y.C.
*Central National Bank of New York, N.Y.C.
*Freedom National Bank, N.Y.C.
*United Orient Bank, New York City
*United States Trust Company of New York, N.Y.C.
*Gateway State Bank, Staten Island

Total: 90/76